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88-1159

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

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No. 88-

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STATE OF ARIZONA, Petitioner

vs.

ALEXSANDRO VINCENTE BRAVO, Respondent

---

# RESPONSE TO THE PETITION FOR WRIT OF CERTIORARI TO THE ARIZONA SUPREME COURT

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41 pp

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Counsel for Respondent

## PARTIES TO THE PROCEEDING

Petitioner is the State of Arizona, through the Attorney General of the State of Arizona, ROBERT K. CORBIN, and assistants, CRANE McCLENNAN and PAUL J. McMURDIE.

Respondent is ALEXSANDRO VINCENTE BRAVO.

TABLE OF CONTENTS:


| | Page |
|---|---|
| Statement of the Case . . . . . | 1 |
| This Court Should Not Grant the Petition . . . . . | 8 |
| Conclusion . . . . . | 16 |

## TABLE OF AUTHORITIES

Cases: Page


Michigan v. Tucker, 917 U.S. 433 . . . 12
(1974)

State v. Carinau, 148 Ariz. 72, 713
P.2d 273 (1985) . . . . . 10

United States v. Ceccolini, 435 U.S.
268, 98 SCt. 1054, 55 L.Ed 2d
268 (1978) . . . . . 15

United States v. Horton, 662 F.2d 628,
632 (9th Cir. 1981), cert. denied
455 U.S. 1004 (1182) . . . . . 15


Constitution, Statutes and Regulations:


A.R.S. §13-4031 . . . . . 3

R.O.A. 159 . . . . . 2

Rule 13.3(a)(2)(a)(3) . . . . . 2

States Response to Defendant's
Motion to Suppress Evidence . . . 10

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Respondent ALEXSANDRO VINCENTE BRAVO hereby opposes the Petition for Writ of Certiorari to review the judgment of the Arizona Supreme Court in this case.

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## STATEMENT OF THE CASE

On May 3, 1984, an indictment was filed in Pima County Superior Court, #CR-13184. That indictment alleged that respondent committed the crimes of armed robbery, aggravated robbery, and aggravated assault on December 13, 1981, in Pima County, Arizona. The alleged victim was one ROLAND TINKER; throughout the proceedings respondent was held in that CR number on an $11,000.00 bond.

On June 14, 1984, a separate indictment was filed which alleged, in CR-13421, that respondent committed first degree murder and armed robbery of SHANG NGOR WONG on December 14, 1981, in Pima County, Arizona. Respondent was held in custody on the indictment on a $250,000.00 bond.

JUDGE JAMES C. CARRUTH of the Pima County Superior Court, based upon DR. RICHARD HINTON'S report to the court, admission of which was stipulated to by the parties,

committed respondent on March 18, 1985, to The Alhambra Home Mental Health Facility for further competency evaluation. Respondent was returned to Pima County on April 29, 1985, by court order.

Pursuant to request by the prosecution and over objections of the defendant, (R.O.A. p. 159), the cases in CR-13184 and CR-13461, which involved separate victims and events, were consolidated pursuant to Rule 13.3(a)(2) and (a)(3).

A motion to suppress was heard as to a purported confession, as to witnesses ascertained from the confession, and as to an indentification of the respondent by the victim TINKER.

On November 4, 1985. JUDGE GILBERT VELIZ of the Pima County Superior Court partially granted that motion to suppress. The decision is contained in the minute entry of that date. The ruling suppressed a

portion of the alleged confession after a request not to answer any additional questions was made. All prior statements were held to be lawfully obtained. The State, in its response to the motion, admitted the latter portion of the statement violated the Fifth Amendment right to remain silent.

On December 4, 1985, the jury returned a verdict of guilty as to all charges on the ROLAND TINKER case (aggravated robbery, aggravated assault, and armed robbery), and guilty to first degree murder on SHANG NGOR WONG, but not guilty on the count of armed robbery in that case.

Pursuant to A.R.S. §13-4031, appeal was taken directly to the Arizona Superior Court. Its decision is fully set forth in Petitioner's Appendices to Petition for Writ of Certiorari.

The facts which relate to this case are as follows:

On December 13, 1981, ROLAND TINKER walked to his Chevy Blazer in the parking lot of the La Quinta motor hotel along the I-10 freeway in Tucson, in the late afternoon hours. At that time he was accosted by a man holding a gun. He was ordered to lay on the ground, and give up his wallet. A second individual was involved as well, who searched TINKER and removed the wallet. The man with the gun approached the victim, picked up the wallet that was then on the ground, and a shot went off which struck the victim in the head. The gun that was involved was a chrome or nickel plated Colt revolver.

The first assailant was described as a tall person with brown, bushy, curly hair, with a dark complexion. On two occasions shortly after the incident, the victim was shown a photo lineup. On one occasion, he indentified one photo as being similar in appearance to his assailant. That photo was of a person named LUIS SEQUIEROS. Neither of

the two involved were suggested to be of taller or shorter stature.

In August, 1984, he was again shown a photo lineup, this time one containing a photo of the appellant. That photo was identified as "being familiar" to him. He never positively identified any person as his robber.

The following day, December 14, 1981, at approximately 9:30 a.m., Officer GEORGE BARNETT, a Tucson police officer assigned to Tucson High School as a school resource officer, responded to a report of a homocide at the H&W Market located near Tucson High. He observed MS. WONG, The owner and operator of the store, lying dead behind the counter still bleeding from the area of the left eye. Only coins were found inside the cash register.

No one was arrested for either of the crimes until 1984, despite intensive police investigation and repeated requests

for information from the public. Then, April 4, 1984, respondent was arrested in Cochise County for an attempted theft of a police vehicle in broad daylight. When he was brought to the Cochise County Jail, he was found to be severely disturbed and delusional.

He was then treated at the Cochise County Jail by the Cochise Community Services, and by the psychiatrist, DR. HEIMAN and mental health nurse, SUSAN COUSEY. On the global assessment scale used by the State of Arizona Department of Behavioral Health Services, he was rated as mentally functioning at a level of 8 on a scale of 1-100, 100 being a fully functioning individual. He was thereafter placed on a medication program of haldol and simatrel, which was changed and increased as required. Although his behavior improved, he was never symptom free during the period of incarceration in Bisbee.

On April 17, 1985, at 2:30 p.m., respondent allegedly informed detention OFFICER WILLECK that he wanted to make a statement about a homocide he had committed on "March 13, 1985.".

Thereafter, he gave a statement to DET. FRANK MARTINEZ of the Cochise County Sheriff's Department, which alluded to possible involvement in the WONG case.

DET. MARTINEZ then called in DET. LOWE of the Tucson Police Department. Disregarding the Fifth Amendment to the United States Constitution, and the Arizona Constitution, Art. 2 Sec. 10, DET. LOWE continued to question the respondent, clearly in a drugged state, even after repeated unambiguous requests to stop the questioning. Based upon information gained after the constitutional violation had occurred, DANNY CHAMPION was brought in to police headquarters shortly thereafter.

Although no one had been charged in the three years following the crime, the name of FRANT MARTINEZ repeatedly came up as the perpetrator of the WONG homocide. Respondent called MARTINEZ to the stand. He of course denied involvement in either of the crimes. However, JUAN URIAS also testified, and admitted that a couple of days after the TINKER robbery and the WONG homocide, he was present at Orry Park in Tucson, when MARTINEZ admitted to him that MARTINEZ had "shot somebody", a "Chinese lady." One witness testified to the statement, although a corroborating witness invoked a Fifth Amendment proceeding, and did not testify before the jury.

**THIS COURT SHOULD NOT GRANT THE PETITION**

A. Petitioner waived any issue that there was only a technical violation of the Miranda Rule rather than a Fifth Amendment Violation by arguing that for the first time

in a Motion for Reconsideration of the Arizona Supreme Court's Decision.

Petitioner requests that this Court grant its petition for the reason that the Arizona Supereme Court erred in suppressing a witness's testimony, as the police misconduct was a mere Miranda violation, rather than an actual Fifth Amendment violation.

Petitioner did not allege before either in the trial court or the Arizona Supreme Court, that the suppressed portion of the alleged confession was not a violation of the Fifth Amendment, until after the Arizona Supreme Court rendered its decision. Rather, it openly admitted before the trial court that the continued questioning constituted improper police conduct, and that the suppressed portion of the taped statement was indeed the subject of a proper order of suppression.

Then, after the Arizona Supreme Court published its decision the State raised

the question in its Motion for Reconsideration as to whether the suppressed portion of the statement was a mere technical violation of the Miranda Rule, or whether it was suppressed as taken in violation of the Fifth Amendment. Pursuant to Arizona law, said issue was not properly raised, and therefore waived. State v. Carinau, 148 Ariz. 72, 713 P.2d 273 (1985).

This court should note that the State's Response to Defendant's Motion to Suppress Evidence, filed with the Pima County Superior Court on November 12, 1985, (contained herein in Appendix A) admits that (p.1):

> "That portion of Defendant's statement beginning with that assertion has been suppressed in violation of Defendant's right to remain silent." (emphasis added)

The petition filed herein is misleading in that it fails to make clear that both the trial court and Arizona Supreme

Court properly divided respondent's alleged confession into two portions: the first portion involved no repeated requests to remain silent; the second portion begins at the first request of the respondent to terminate the questioning.

The Arizona Supreme Court found the first portion voluntary. However, the State of Arizona glosses over the separation of the statement into two parts, and incorrectly asserts the statement was determined to be voluntary in its entirety.

This assertion is simply not true, as the Arizona Supreme Court did not need to address the voluntariness of the second portion, as the State openly admitted at the trial level that the second portion of the statement violated the Fifth Amendment to the United States Constitution. Only after the Arizona decision was handed down did it try to retract its previous admission.

Clearly, the State of Arizona's request to reopen that issue was foreclosed before the Arizona Supreme Court, and properly should also be foreclosed before this Court.

As the statement was therefore a violation of the Fifth Amendment, the State's argument falls apart as completely as a stack of cards when a base card is removed. The exclusionary rule remains applicable to live-witnesses' tesminony resulting from a constitutional violation.

Michigan v. Tucker, 917 U.S. 433 (1974) in differentiating the result of a mere failure to provide prior Miranda warnings, as opposed to a Fourth or Fifth Amendment violation, stated (at pp. 446/447):

> "We have recently said in a search-and-seizure context, that the exclusionary rule's 'prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and

> seizures.' United States v. Calandra, 414 U.S. 338, 347 (1974). We then continued: 'The rule is calculated to prevent, not to repair. Its purpose is to deter--to compel respect for the constitutional guaranty in the only effectively available way--by removing the incentive to disregard it. Elkins v. United States, 364 U.S.206, 217 (1960).' Ibid.
>
> In a proper case this rationale would seem applicable to the Fifth Amendment context as well.
>
> The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused."

The State gives quick service to its previous admission by trying to lump the two portions of the confession into one, and then claiming the Arizona Supreme Court ruled that it was

"voluntary." The record makes clear the falsity of this assertion.

Even more disturbing however, is its failure to acknowledge the seriousness of the police misconduct in this case. Serious constitutional violations by persons charged with the duty to protect the constitution require serious consequences. Rarely has the Arizona Supreme Court in a written decision so severely chastised a police officer as it did in this case.

It wrote, on p. 23 of the decision:

> "The police in this case did exactly what the Supreme Court suggested would have been improper for the officer involved in Ceccolini to do. They were attempting to find witneses when they violated the defendant's Miranda rights.The stated philosophy of the detectives was to ignore the requireements of Miranda and to let the courts sort it all out later. The state is ill-served by such disregard for the law, and this case and the resulting reversal is a prime example of such ill-service."

Obviously, the judicial system must be ever alert to see that our constitution remains a viable, enforced document.

B. This Court has already adequately addressed the Issues presented herein, and the Arizona Supreme Court properly applied the Court's guidelines.

This Court has previously addressed the issues involved herein. United States v. Ceccolini, 435 U.S. 268, 98 SCt. 1054, 55 L.Ed. 2d 268 (1978). Relying on the Ceccolini guidelines, the Federal Court, in United States v. Horton, 662 F.2d 628, 632 (9th Cir. 1981), cert. denied 455 U.S. 1004 (1182), has set forth a four prong test to determine the admissability of tainted-live-witness's testimony.

The Arizona Supreme Court specifically used these guidelines to properly apply the facts in the record of this case. Thirteen pages are allotted to a very careful and insightful analysis of the

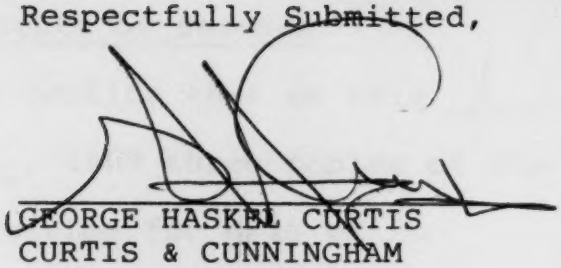
facts. The State of Arizona therefore requests that this Court embark on a course of factual review that could be done in every case in every appellate court in the United States, a most burdensome request indeed.

Reference is therefore made to pages 17-30 of the Arizona Supreme Court's Decision to refute the State's assertion; as that Court set forth its analysis far more succinctly than respondent ever could.

## Conclusion

The State should not now be allowed to raise matters, previously waived. As the Arizona Supreme Court has specifically applied the Court's guidelines in the legal areas in question, the Petition for Writ of Certiorari should be denied.

Respectfully Submitted,



GEORGE HASKEL CURTIS
CURTIS & CUNNINGHAM
Attorneys at Law
5610 E. 22nd Street
Tucson, AZ 85711
Counsel for Respondent

January 30, 1989

## Certificate of Service

I, hereby certify that on this 1 day of February, 1989 three copies of the Response to the Petition for Writ of Certiorari were mailed, postage prepaid, to:

Attorney General
State Capitol
Phoenix, AZ 85007
Attn: Crane McClennen
Paul J. McMurdie
Counsel for Petitioner

I further certify that all parties required to be served have been served.

CURTIS & CUNNINGHAM
Attorneys at Law

By _____
GEORGE HASKEL CURTIS
Attorney for Respondent
5610 E. 22nd Street
Tucson, AZ 85711

STATE OF ARIZONA )
County of Pima ) ss.

SUBSCRIBED AND SWORN TO before me this 1 day of February, 1989.

_____
Notary Public

My commission expires:

1-15-93

# APPENDIX

ARIZONA SUPERIOR COURT, PIMA COUNTY

Judge: GILBERT VELIZ

Case No. 13184/13421

Court Reporter: G. Silbernagel

Date: November 4, 1985

STATE OF ARIZONA (Rick Unklesbay

vs.

ALEXSANDRO BRAVO, (George Curtis)

MINUTE ENTRY

RESUMPTION OF HEARING ON DEFENDANT'S MOTION TO SUPPRESS STATEMENTS; DEFENDANT'S MOTION TO CONTINUE TRIAL DATE:

Defendant present, in custody.

DEFENDANT'S MOTION TO SUPPRESS STATEMENTS:

Messrs. Curtis and Unklesbay argue to the Court.

For the reasons set forth on the record,

IT IS ORDERED that the statements made by the defendant after he stated that he did not want to answer any more questions are suppressed.

IT IS FURTHER ORDERED that the motion to suppress the other statements that were made prior to that time is denied; and

THE COURT FINDS that the defendant made the statements voluntarily and intelligently after having been advised of his constitutional rights.

DEFENDANT'S MOTION TO CONTINUE TRIAL DATE:

Messrs. Curtis and Unklesbay argue to the Court.

IT IS ORDERED granting the defendant's motion to continue the trial for one week. The extraordinary reason for the continuance is the fact that defendant's counsel has been working on two homicide

cases at the same time and needs additional time for the preparation of this case.

IT IS THEREFORE ORDERED that the trial is rescheduled for November 19, 1985 at 10:00 a.m.

IT IS FURTHER ORDERED that the pretrial order heretofore issued continues in full force and effect in every other respect.

IT IS FURTHER ORDERED that the pretrial motions dealing with dessurealt and the defendant's motion to exclude evidence because of the "poison tree doctrine" are set for hearing on November 18, 1985 at 1:30 p.m.

IT IS FURTHER ORDERED that the defendant file his notice of defenses on or before November 8, 1985 at 5:00 p.m.

cc:
Hon. Gilbert Veliz
County Attorney
George Curtis, Esq.
Sheriff

Rosemary Chastain
Deputy Clerk

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF PIMA

| | |
|---|---|
| THE STATE OF ARIZONA ) | |
| ) | No. CR-13421/13184 |
| Plaintiff, ) | |
| ) | STATE'S RESPONSE TO |
| vs. ) | DEFENDANT'S MOTION |
| ) | TO SUPPRESS |
| ALEXANDRO BRAVO, ) | EVIDENCE |
| ) | |
| Defendant. ) | |
| ) | |

COMES NOW the State of Arizona, by and through the Pima County Attorney, STEPHEN D. NEELY, and his deputy, RICK UNKLESBAY and hereby responds and objects to Defendant's Motion to Suppress Evidence as set forth in the attached Memorandum of Points and Authorities.

Respectfully submitted this 12th day of November, 1985.

STEPHEN D. NEELY
PIMA COUNTY ATTORNEY

By /s/
Rick Unklesbay
Deputy County Attorney

Copies delivered/mailed
this 12th day of
November, 1985 to:

George Curtis
Attorney at Law
5610 E. 22nd St.
Tucson, AZ 85701

Honorable Gilbert Veliz
Judge of the Superior Court
Division Two

MEMORANDUM OF POINTS AND AUTHORITIES

FACTS

The facts are set forth in the State's Opposition to Defendant's Motion to Suppress Statements. Additional facts are set forth below.

Defendant Bravo seeks to exclude the testimony of a number of witnesses at trial. Those witnesses are Danny Champion, Jerry Galvan, and Ernie and Sergio Hollingsworth. The basis for Defendant's Motion is that the State learned of those persons during the

course of an interview of the Defendant but only after Defendant indicated on tape that he no longer wished to answer questions. That portion of Defendant's statement beginning with that assertion has been suppressed as violative of Defendant's right to remain silent. Defendant's motion indicates that Wong Sun v. United States, 371 U.S. 471, 80 S.Ct. 407 (1963) is controlling and that the testimonial evidence must also be suppressed.

Some testimony has already been heard regarding this motion. Detective Perry Lowe of the Tucson Police Department testified that he, in fact, did continue questioning Defendant Bravo after Bravo stated his desire not to answer further questions. Detective Lowe further testified that he did so in order to determine if Bravo

knew more facts about the crimes in question to rule out the possibility that Bravo was fabricating his involvement. It was then that the name of Danny Champion came to light.

Fifteen days after interviewing Bravo, detectives met with Danny Champion and interviewed him. During the interview Champion told the officers he had been with Bravo during the armed robbery. Two weeks later, Champion again met detectives and informed them that he had information regarding the homocide.

From Champion officers got the name of Jerry Galvan. Officers met with Galvan who also supplied officers with information on the homicide. The name Hollingsworth was obtained from Bravo prior to his statement

requesting that no further questions be asked, and even earlier by Detective Frank Martinez.

LAW

Although Defendant relies on Wong Sun v. United States, id., as authority to suppress the testimony of these witnesses, several cases regarding such live-witness exclusions have been decided since that 1963 decision. In U.S. v. Ceccolini, 435 U.S. 268, 98 S.Ct. 1054 (1978), the United States Supreme Court considered the difference between possible exclusion of illegally obtained inanimate evidence and that of live-witness testimony. In that case, an illegal search by law enforcement resulted in the discovery of a witness who later was called to testify at trial. In holding that the testimony of the live witness, even

though discovered in an illegal search, was proper, the Court noted that:

> The fact that the name of a potential witness is disclosed to police is of no evidentiary significance, per se, since the living witness is an individual human personality whose attributes of will, perception, memory, and volition interact to determine what testimony he will give. The uniqueness of this human process distinguished the evidentiary character of a witness from the relative immutability of inanimate evidence. Id. at U.S. 277.

The court offered varying factors to consider in determining the admissibility of the live-witness testimony. The degree of free will exercised by the witness is relevant to determine the extent that the purpose of the exclusionary rule will be advanced by its application. The Court found that the degree of free will necessary to dissipate the taint of illegality will more likely be found in cases of live witness

testimony that other kinds of evidence. Id. U.S. at 276. The Court must assess the effect of the illegal search on the exercise of the witnesses' free will. Where the police misconduct did not induce the witness's cooperation, the testimony should not be suppressed even though the unreasonable conduct led to the witness's testifying. U.S. v. Hooton, 662 F.2d 628, (1981, 9th Cir.) U.S. v. Leonardi, 623 F.2d 746, (1980, 2nd. Cir.).

An additional factor to consider is that exclusion of alive witness perpetually disables that witness from testifying about relevant and material issues. The Supreme Court in Ceccolini, supra. found such rules to be "serious obstructions to the ascertainment of truth." Id. at 277. Likewise, in Michigan v. Tucker, 417 U.S.

433, 94 S.Ct. 2357 (1974), the Court held admissible the testimony of a live witness whose identity was discovered through the Defendant's statement after inadequate Miranda warnings. Approving Tucker again in Ceccolini, the Court reaffirmed its disapproval of a per se exclusion:

> For, when balancing the interests involved, we must weigh the strong interest under any system of justice of making available to the trier of fact all concededly relevant and trustworthy evidence which either party seeks to adduce. ... Here respondent's own statement, which might have helped the prosecution show respondent's guilty conscience at trial, had already been excised from the prosecution's case. . . To extend the excision further under the circumstances of this case and exclude relevant testimony of a third-party witness would require far more persuasive arguments than those advanced by respondent. Ceccolini at 278.

The Ninth Circuit Court of Appeals in U.S. v. Hooton, supra. examined what determinations must be made in light of the Supreme Court's decision in Ceccolini. Hooton had sought suppression of live testimony from witnesses discovered in an illegal search of Hooton's records of gun transactions. The Ninth Circuit notes that the Court should consider (1) The stated willingness of the witness to testify; (2) The role played by the illegally seized evidence in gaining the witnesses cooperation; (3) The proximity between the illegal behavior, the witnesses decision to cooperate and the actual testimony at trial; and (4) The police motivation in conducting the search. Hooton at 632. These factors should assist the Court in determining whether a significant attenuation exists

between the police misconduct and the live-witness testimony. Id. As already stated, where the misconduct does not induce cooperation, the testimony will not be suppressed.

Importantly, the Court in Hooton does not limit this standard only to "good citizen" witnesses. The Court recognized a number of cases where the live witness testimony was not from a citizen witness: U.S. v. Leonardi, supra (unindicted co-conspirators testifying due to plea bargain); U.S. v. Brookins, 614 F.2d. 1037 (1980, 5th Cir.) (under grant of immunity); U.S. v. Stevens, 612 F.2d 1226 (co-conspirators testifying pursuant to plea bargain). Hooton, supra at 633.

An important theme running throughthe cases cited above has been whether

exclusion of the live-witness testimony would serve the remedial objectives of the exclusionary rule. The penalties imposed must bear some relation to the purposes which the law serves. Thus, a principle factor of attenuation is the motivation of the police in conducting the search. In Ceccolini, the Court found that as the police motivation was not to find a willing witness, that exclusion would have no deterrent effect and the cost of excluding forever a live witness was too great. Id. at 280.

In applying these principals to Defendant Bravo, the testimony of Danny Champion and Jerry Galvan is admissible. As in Ceccolini, detectives in the instand case obtained a name from Bravo, not being evidentiary in and of itself. Although that name eventually led to statements from Danny

Champion, that evidence was subject to the will, perception, and memory of Champion concerning events occurring almost two and one half years earlier. This Court will hear evidence that Champion not only willingly talked to officers but in fact, recontacted them later to give them further information. The State is now seeking to have Champion testify one and one half years after that initial statement, a further factor as to the "proximity" between the illegal behavior, the decision to cooperating and the actual trial testimony.

Finally, the importance of the police motivation for the search must be noted. Detective Lowe has previously testified that the reason for continued questioning of Bravo was to ensure the officers that Bravo knew facts about the case

and was indeed the man sought. Exclusion of Champion's testimony could have not deterrent effect on such conduct nor in fact would any reasonable person want to deter the police from possibly clearing an innocent person.

Ceccolini, supra. concludes that while no mathematical weight can be given to the factors mentioned they all point to one conclusion. That is:

> That the exclusionary rule should be invoked with much greater reluctance where the claim is based on a casual relationship between a constitutional violation and the discovery of a live witness than when a similar claim is advanced to support suppression of an inanimate object. Id. at 280.

Interestingly, in a concurring opinion, in Ceccolini, the Chief Justice wrote that the distinction between live-witness testimony and other types of evidence is so fundamental that the

fact-finder should not be prevented from hearing the live evidence except under the most remarkable to circumstances. The Chief Justice noted no such circumstances had ever been presented. Id.

The State submits that such is the leaning of the Court presently and that to exclude such relevant and material witness would unduly and unnecessarily prevent the fact-finder from deciding the case on the true facts. The case law makes clear that such testimony is not only permissible, but essential to a fair determination of facts. As quoted in Ceccolini from McGuire v. United States, 273 U.S. 95 (1927),:

> A criminal prosecution is more than a game in which the government may be checkmated and the game lost merely because its officers have not played by the rule.

Based on the foregoing, it is respectfully requested that Defendant's Motion to Suppress be denied.

Respectfully submitted this 12th day of November, 1985.

STEPHEN D. NEELY
PIMA COUNTY ATTORNEY

By /s/
Rick Unklesbay
Deputy County Attorney